

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 LUMETIQUE, INC.,) NO. CV 17-3473-VAP(Ex)
12 Plaintiff,)
13 v.) CERTIFICATION AND ORDER
14 STONE DISTRIBUTORS, INC.,) TO SHOW CAUSE RE CONTEMPT
15 Defendant.)
16)

18 The Magistrate Judge has read and considered all papers filed in
19 support of and in opposition to the "Application of Judgment Creditor
20 Lumetique, Inc., for an Order to Show Cause Why Contempt Sanctions
21 Should Not be Issued Against Third Party Witness Michael Wainer for
22 his Failure to Produce Documents at his Examination to Aid in the
23 Enforcement of a Judgment, etc." ("the Application"), filed
24 January 3, 2018. The Magistrate Judge has taken the Application
25 under submission without oral argument.

IT IS ORDERED that Michael Wainer ("Wainer") shall appear on
March 19, 2018, at 2:00 p.m., in the Courtroom of the Honorable

1 Virginia A. Phillips, Chief United States District Judge, at 350 West
2 1st Street, Courtroom 8A, Los Angeles, California 90012, and then and
3 there to show cause, if there be any, why Wainer should not be
4 adjudged in contempt by reason of the facts certified herein.

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6 In accordance with 28 U.S.C. section 636(e), the Magistrate
7 Judge certifies the following facts:¹

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9 1. On September 4, 2014, the United States District Court
10 for the Eastern District of Texas entered a default
11 judgment in the amount of \$1,053,000 plus attorneys' fees
12 and expenses in favor of Plaintiff Lumetique, Inc.
13 ("Lumetique") and against Defendant Stone Distributors,
14 Inc. ("Stone Distributors").

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16 2. On April 6, 2017, Lumetique registered the default
17 judgment in this Court.

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19 3. On May 5, 2017, Lumetique filed an "Application for
20 Appearance and Examination" of Wainer.

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22

23 ¹ The question of whether Wainer should be held in
24 contempt on these certified facts, and the question of the
25 appropriate sanctions to be imposed, if any, are commended to the
26 District Judge for her consideration. See 28 U.S.C. § 636(e);
27 see also Bingman v. Ward, 100 F.3d 653, 658 (9th Cir. 1996),
28 cert. denied, 520 U.S. 1188 (1997); Taberer v. Armstrong World
Industries, Inc., 954 F.2d 888, 903-908 (3d Cir. 1992). The
limited contempt powers granted to Magistrate Judges in the
"Federal Courts Improvement Act of 2000" do not extend to the
circumstances presented in the instant case. See 28 U.S.C. §
636(e).

1 4. On May 10, 2017, the Magistrate Judge denied this
2 application without prejudice, stating, inter alia, that
3 the application "fails to demonstrate that Michael Wainer
4 has information concerning the Judgment Debtor sufficient
5 to aid in the enforcement of the Judgment."

6
7 5. On May 24, 2017, Lumetique filed another "Application
8 for Appearance and Examination" of Wainer. In support of
9 this application, Lumetique filed a declaration to which
10 were attached exhibits appearing to reflect that: Stone
11 Distributors was a candle business; Wainer was an officer
12 of Stone Distributors; shortly after Lumetique began its
13 2014 lawsuit against Stone Distributors, Stone Candle Bar
14 Inc. ("Stone Candle") filed Articles of Incorporation;
15 Stone Candle is a candle business in which Wainer and
16 Wainer's son are involved; and Wainer is the Chief
17 Executive Officer ("CEO"), Chief Financial Officer and
18 Controller of Stone Candle. See Exhibits 1, 2, 3, 4, 6, 7,
19 9 and 10 to the Declaration of Ryan T. Koczara, filed
20 May 24, 2017.

21
22 6. On May 25, 2017, the Magistrate Judge granted the
23 application for an examination of Wainer, and ordered that
24 Wainer appear before the Magistrate Judge on June 30, 2017,
25 at 9:30 a.m. in Courtroom 750 of the Roybal Courthouse.

26
27 7. On June 1, 2017, counsel for Lumetique issued a
28 subpoena to Wainer requiring the production of certain

1 documents relating to Stone Distributors, as well as
2 documents relating to Stone Candle and Ecolight Inc.
3 ("Ecolight"). Ecolight is another candle business in which
4 Wainer is (or was) involved.²

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6 8. On June 30, 2017, counsel for Lumetique appeared for
7 the examination of Wainer, but Wainer failed to appear.
8 The Magistrate Judge continued the examination to
9 August 18, 2017, at 9:30 a.m. in Courtroom 750.

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11 9. On July 28, 2017, Lumetique filed a proof of service
12 purporting to reflect a July 11, 2017 service on Wainer (through
13 "Deluca Densmore") of the "Notice of Continuance of Appearance
14 and Examination of Third Party Re: Enforcement of Judgment and
15 Subpoena to Produce Documents to Michael Wainer."

16
17 10. On August 18, 2017, Wainer and counsel for Lumetique
18 appeared before the Magistrate Judge for the examination of
19 Wainer. Although Wainer had not filed any objections to the
20 subpoena, Wainer orally objected to producing any document
21 responsive to the subpoena. Wainer objected on grounds of
22 relevance, trade secret, and his purported lack of access to the
23 documents of Stone Candle. The Magistrate Judge overruled the
24 relevance objection as untimely and invalid in light of the
25 potential relevance of Stone Candle documents to issues of

27 ² The Application includes Ecolight filings with the
28 California Secretary of State identifying Wainer as a director of
Ecolight. See Exhibits 3 and 9 to the Declaration of Ryan T.
Koczara, filed January 3, 2018.

1 possible successor liability. See Cleveland v. Johnson, 209
2 Cal. App. 4th 1315, 1326-34, 147 Cal. Rptr. 3d 772 (2013).³ With
3 regard to Wainer's trade secret objection, the Magistrate
4 Judge restricted Lumetique's access to the subpoenaed
5 documents to access by Lumetique's attorneys only (a ruling
6 as to which Wainer responded "Fair enough"). With regard
7 to the objection based on Wainer's purported lack of access
8 to Stone Candle documents, the Magistrate Judge overruled
9 the objection in light of the corporate documents on file
10 and because Wainer had admitted in open court that he is
11 the Controller of Stone Candle, and that he is the CEO of
12 Stone Candle.⁴ The Magistrate Judge then ordered Wainer to
13 produce all documents responsive to the subpoena at a
14 continued examination of Wainer to occur on September 15,
15 2017, at 9:30 a.m. in Courtroom 750.

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17 11. On September 15, 2017, Wainer and counsel for Lumetique
18 appeared for the continuation of the examination. However,
19 Wainer again failed to bring with him any document responsive to
20 the subpoena. Instead, Wainer made a frivolous argument that
21 the subpoena supposedly did not require the production of any
22 documents other than the documents of Stone Distributors. The
23 Magistrate Judge rejected this argument on the basis of a plain

24
25 ³ It now appears that Stone Distributors' web address
26 routes potential customers to Stone Candle's website. See
27 Declaration of Dayna Decker, Exhibit B, and Declaration of Ryan
28 T. Koczara, filed February 14, 2018, ¶ 5.

27 ⁴ After admitting in open court that he is the CEO of
28 Stone Candle, Wainer then denied in open court that he is the CEO
 of Stone Candle.

1 reading of the subpoena. Counsel for Lumetique then indicated
2 an intention to proceed by way of contempt.

3

4 12. In opposition to the Application, Wainer and Wainer's son
5 now appear to claim Wainer does not have and has never had
6 possession, custody or control of any document responsive to the
7 subpoena. This claim is inconsistent with admissions previously
8 made by Wainer and also appears inconsistent with public filings
9 previously made by the corporations whose documents are
10 involved.

11

12 13. In the Application, Lumetique proposes a "Statement of
13 Facts to be Certified by the Court." Because Lumetique's
14 proposed statement includes matters as to which the Magistrate
15 Judge lacks personal knowledge and cannot properly take judicial
16 notice, the Magistrate Judge has declined to adopt the proposed
17 statement verbatim. Instead, the Magistrate Judge now issues
18 the present certification.

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20 DATED: February 15, 2018.

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22 _____ /s/
23 CHARLES F. EICK
24 UNITED STATES MAGISTRATE JUDGE
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